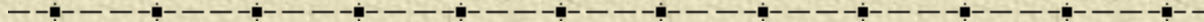
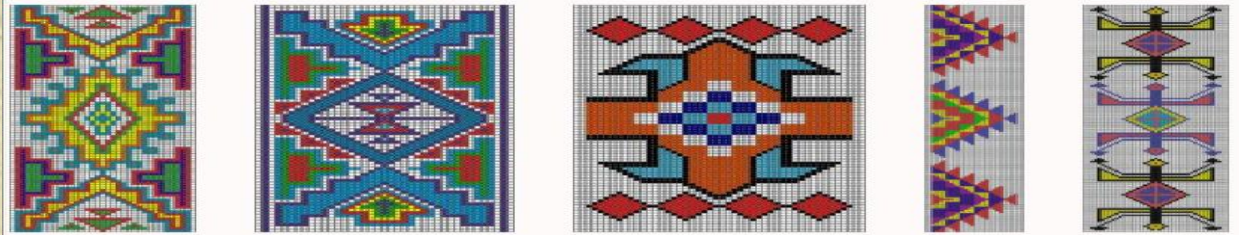


# ***Evolution of Federal Indian Policy***

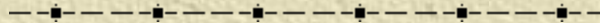


***Mark Gilfillan***

***USACE Sacramento District***

***Tribal Liaison***

***November 2010***



# Indian Nations surrounded by Oklahoma





# *Indian Nations surrounded by Oklahoma*



# *Indian Nations surrounded by Oklahoma*





# ***Prior to European Contact***

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- ✧ **Indian ancestors inhabited North America for tens of thousands of years**
  - ◆ Population estimates vary - perhaps as many as 12 million with more than 500 different language groupings and hundreds of complex cultures
- ✧ **Not same European concept of 'owning' land**
- ✧ **Governments were established-land transfers did exist**
- ✧ **Spirituality intertwined with governance and daily lives**
  - ◆ Spiritual beliefs varied but some common themes were shared (i.e., earth/land sacredness)

# ***1492-The Big Picture***

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# 1492





# ***Colonial Period (1492 – 1776)***

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## **Acquiring Indian Land**

- ◆ **Consent Theory-an act of reason with deliberation**
  - **Voluntary agreement by a person**
    - ◆ Possession of something
    - ◆ Sufficient mental capacity to choose
- ◆ **Doctrine of Discovery**
  - **Indians possessed “aboriginal title”**
    - ◆ Right of occupancy only
  - **“Discovering” nation obtained pre-emptive right to extinguish aboriginal title by treaty, purchase, or conquest**



## ***Colonial Period, cont.***

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### **Three assumptions underlie treaty-making:**

- ◆ Both parties are sovereign powers
- ◆ Indian nation or tribe has a transferable title to something
- ◆ Acquisition of Indian lands must be controlled by the government , not the states

# ***Early U.S.-Indian Relations (1776 -1830)***

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## ✧ **Northwest Ordinance of 1787**

## ✧ **U.S. Constitution**

- ◆ Commerce Clause, Art. I, Sec. 8
- ◆ Supremacy Clause, Art. VI

## ✧ **4-Trade and (non) Intercourse Acts (active)**

- ◆ Forbade purchase of land directly from Tribal Nations by states
- ◆ Forbade non-Indians from settlement, hunting or grazing
- ◆ Trade w/Indians subject to regulation & license

## ✧ **Treaty making continued**

- ◆ Subject all interaction to Federal control



**1790**



# ***The Removal Era (1820 -1850)***

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## **The Cherokee Cases (foundational-J. Marshall Trilogy)**

- ◆ Johnson v. McIntosh (1823)
  - **Doctrine of discovery endorsed**
- ◆ Cherokee Nation v. Georgia (1831)
  - **Tribes “domestic dependent nations”**
- ◆ Worcester v. Georgia (1832)
  - **Tribal sovereignty recognized**
  - **State jurisdiction denied**
  - **Applied to all tribes-conquered, treaty dependent or not yet encountered**

## **Indian Removal Act of 1830**



# 1830



# ***The Reservation Era (1850 -1887)***

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## ✧ **Further removal became difficult**

- ◆ Solution: reservations
- ◆ Goal: acculturate, assimilate & Christianize

## ✧ **1871: Congress ended treaty-making with tribes**

- ◆ Senate no longer ratifying treaties
- ◆ Tribes no longer considered independent sovereign nations
- ◆ Rights could be limited by simple act of Congress
- ◆ 390 treaties with tribes between 1778 and 1871, broken
- ◆ Other Acts initiated (i.e., the Dawes Act)

## ✧ **Ex parte Crow Dog (1883)**

## ✧ **The Major Crimes Act (1884)**



# 1860



# ***Allotment and Assimilation (1887 – 1934)***

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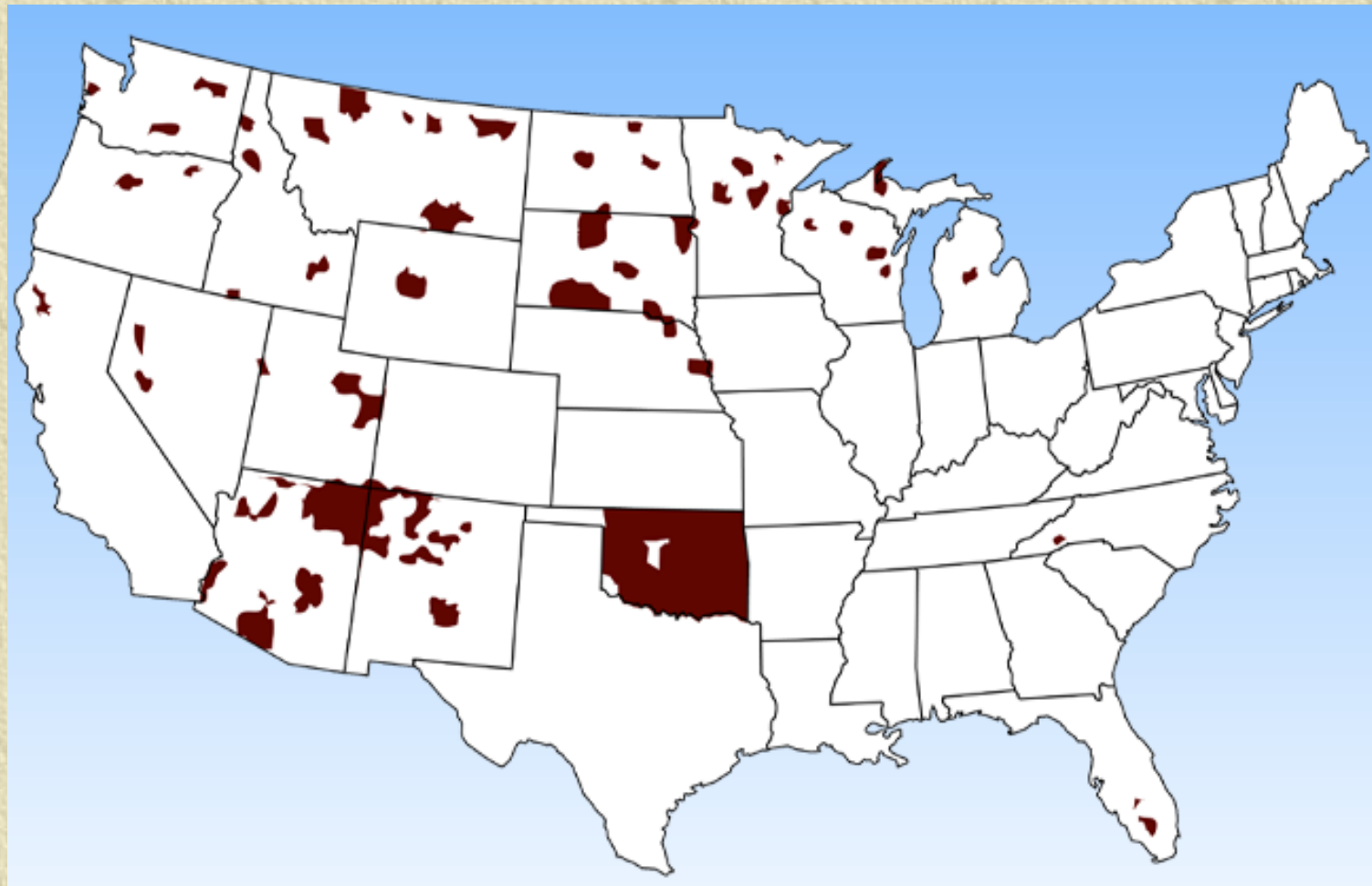
✧ **Land greed and belief in benefits of assimilation combine in...**

✧ **General Allotment Act of 1887 (Dawes Act)**

- ◆ Mechanism to divide communally held lands
- ◆ Result:
  - 90M acres of tribal lands lost
  - Poverty, ill health, unemployment, illiteracy
- ◆ Lone Wolf v. Hitchcock (1903)
- ◆ Meriam Report (1928)



# 1890



# *Indian Reorganization (1934 – 1953)*

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## ✧ Indian Reorganization Act (1934)

- ✧ Assumption: tribes not only would be in existence indefinitely, but *should* be
- ✧ Ended practice of allotment and extended trust period for existing allotments
- ✧ Recognized tribes inherent right to adopt constitutions
  - **Subject to approval of the Secretary of Interior**
  - **Model followed non-Indian pattern**
- ✧ Act provided framework for self-government



# ***Indian Reorganization Period— USACE, Civil Works Actions***

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## **Flood Control Act Of 1944**

- ◆ Authorized Corps of Engineers to establish flood control plan along eastern border of Cheyenne River Reservation; significant negative impact on local Tribal Nations

## **Beginning of MO River Basin development**

- ◆ 1945 Act - Condemned Osage rights for Hulah Dam & Reservoir Project

## **War Department Civil Appropriations Acts -- 1945 Thru 1952**

- ◆ Various authorizations for Secretary of War to condemn Tribal lands for Corps of Engineers dam and reservoir projects

# ***Termination & Relocation (1953 – 1968)***

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## **House Concurrent Resolution 108 (1953)**

- ◆ Adopted official policy of “termination”
- ◆ Tribal Nations subjected to state laws, lands sold
- ◆ Trust relationship with 109 Tribal Nations terminated

## **Pub. L. No. 280 extended state civil and criminal jurisdiction to Indian country in 6 states**

## **BIA encouraged reservation Indians to relocate to metropolitan centers**



# *Termination Era: Corps Activities*

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## ✧ **Public Works Appropriations Acts -- 1954 Thru 1962**

- ✧ 1954 -- Corps was authorized to compensate Tribal Nations and other individual Indians whose fishing rights and interest would be affected by The Dalles Dam on the Columbia River; subsequent Acts contained similar provisions regarding other projects
- ✧ 1956 -- Corps was authorized to relocate Indians living in The Dalles Dam Project Area

# ***Termination: More Corps Activities***

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## **More Public Works Activities**

- ◆ 1957 -- Seneca Nation hired engineers to prove to Corps that Kinzua Dam could be built more effectively 30 miles downstream, keeping them from losing 10,000 acres of land; Corps would not consider the alternative
- ◆ 1958 -- Miccosukee opposed the Everglades Project, citing all the negative impacts; Corps proceeds.
  - In 1994 the Everglades and Kissimmee River Restoration Projects implemented to reverse the effects of 1958 project



# ***Tribal Self-Determination (1968 to Present)***

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## **Indian Civil Rights Act of 1968**

- ◆ Amended Pub. L. No. 280 to require tribal consent
- ◆ Imposed Bill of Rights upon tribes

## **President Nixon declared termination a failure**

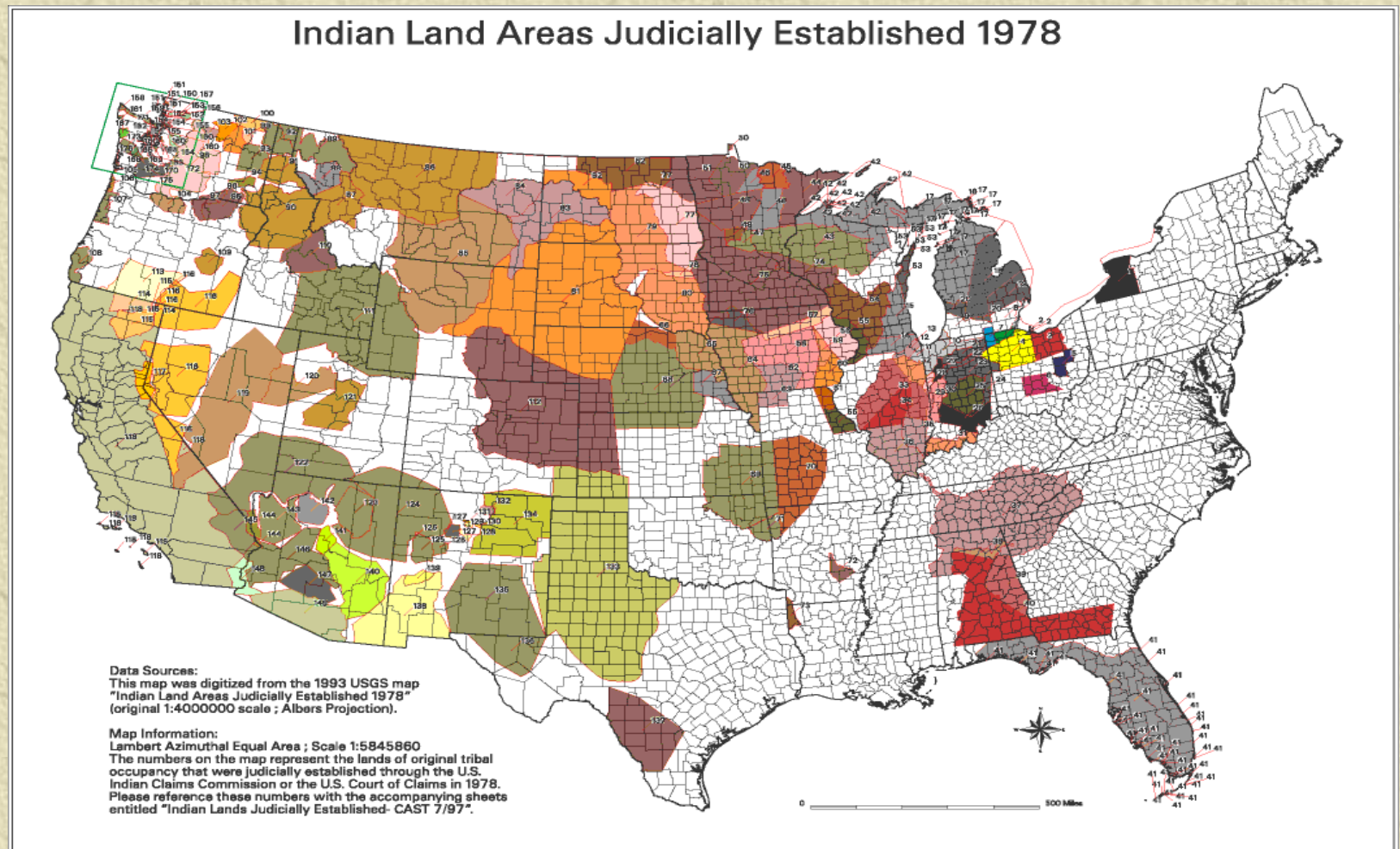
- ◆ Stressed importance of trust responsibility
- ◆ Urged legislation to promote tribal self-determination

## **Indian Self-Determination and Education Assistance Act (Pub. L. No. 93-638)**

## **Indian Claims Settlement Acts**

- ◆ Contrary to self-determination (i.e., states involved)

# 1978-Indian Land Areas





# ***Tribal Self-Determination (cont.)***

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## **President Clinton**

- ◆ Memo on Gov't-to-Gov't Relations (1994)
- ◆ E.O. 13007 (1996): Indian Sacred Sites
- ◆ E.O. 13084 (1998): Consultation & Coordination w/Tribal Governts.
- ◆ E.O. 13175 (2000): Consultation with Tribal Governments

## **President Bush**

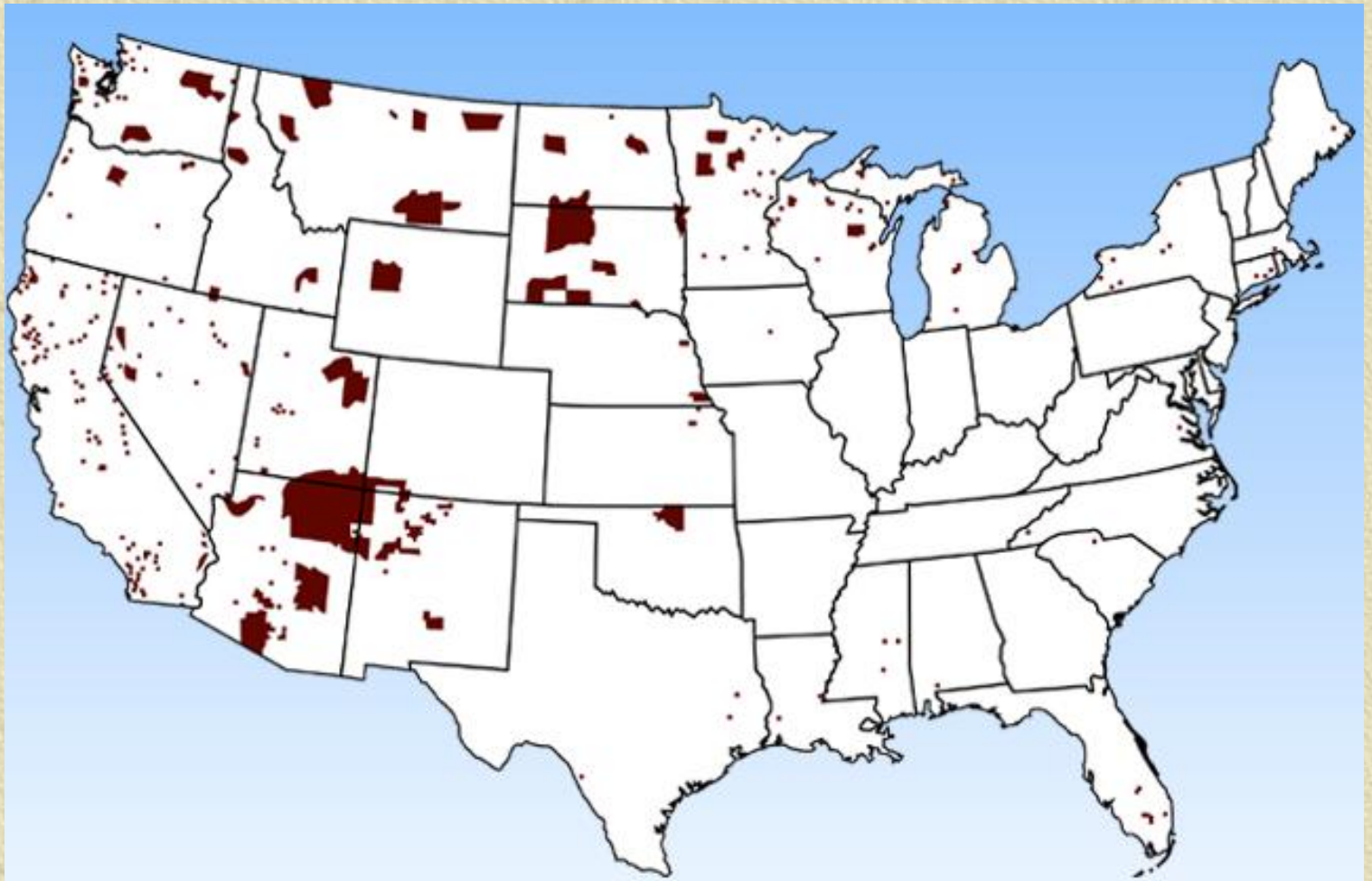
- ◆ E.O. 13336 (2004): Education
- ◆ Memo on Gov't-to-Gov't Relations (2004)

## **President Obama**

- ◆ Memoranda for the Heads of Executive Departments and Agencies, Tribal Consultation, November 5, 2009
- ◆ The WhiteHouse.gov web site

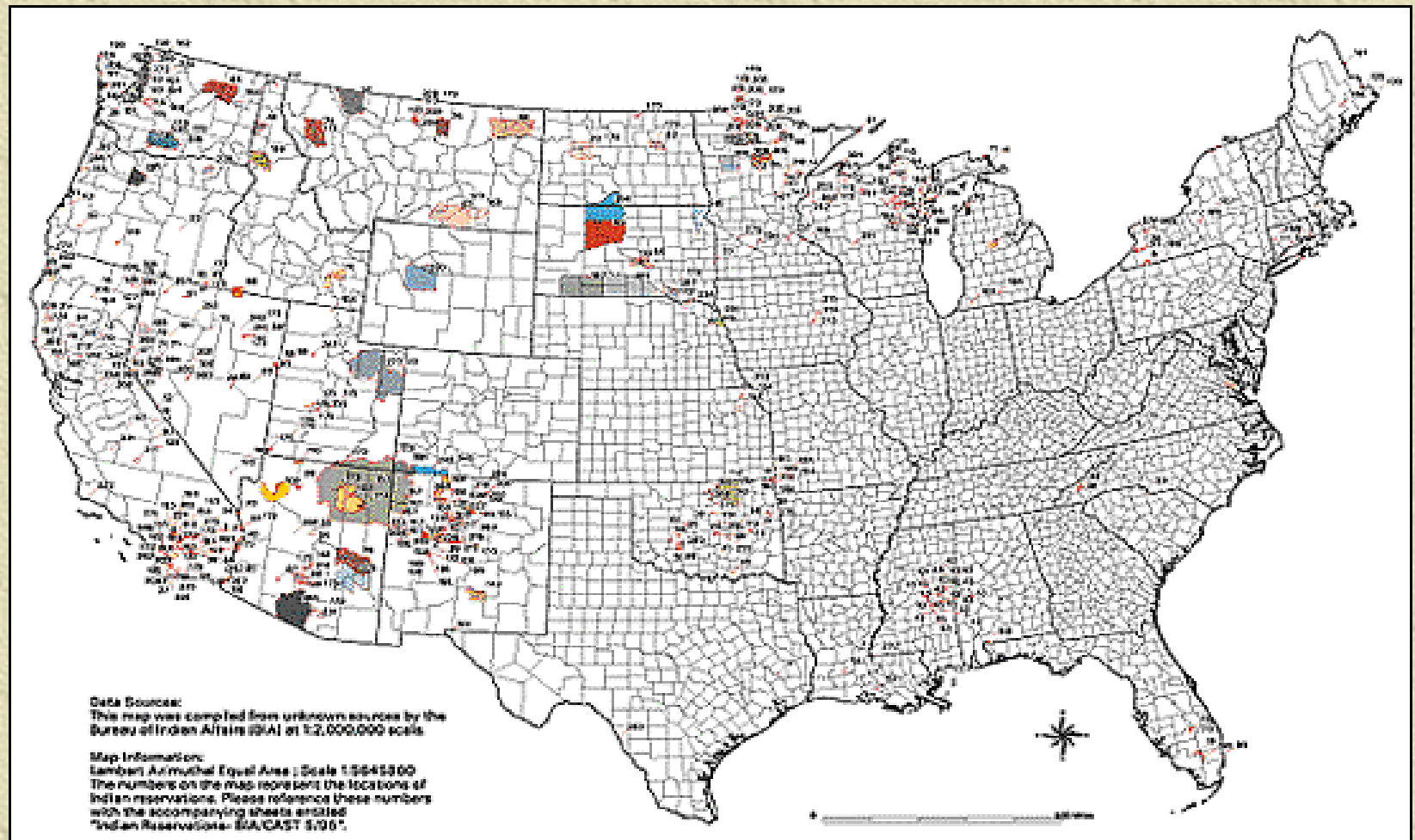
# ***Present Day-Reservation Lands***

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# Indian Land Areas-Present Day



# ***Major Themes of Federal Indian Law***

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## **Trust responsibility**

- ◆ The federal government owes a fiduciary duty to Tribal Nations.
- ◆ This duty is like that of a trustee to a beneficiary.
- ◆ Applies principally to protection of tribal lands and trust resources.
- ◆ The federal government can be expected to intervene and support tribes in actions affecting tribal lands and resources.
  
- ◆ Are there varying interpretations?
  - **Federal Courts (Indian Canon of Statutory Construction)**
  - **Tribal Courts**
  - **Tribal Governments**
  - **Federal Agencies**



# ***Major Themes of Federal Indian Law***

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## **Congressional plenary power**

- ◆ Full and complete power over all Indian Nations, their governments, their members, and their property-Supreme Court recognizes this power- but determined it is not absolute, limitations are:
  - **Due Process Clause-life, liberty or property**
  - **Just Compensation Clause, and in theory-**
    - ◆ **Doctrine of Trust Responsibility-obligation of loyalty from the US Government and to fulfill its treaties.**

# *Major Themes of Federal Indian Law*

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## ✧ **Retained tribal sovereignty (Reserved Rights Doctrine)**

- ✧ May be diminished by statute, but
- ✧ Tribes retain all aspects of sovereignty not expressly given up or abrogated
- ✧ May only be abrogated by the clear and unambiguous intent of Congress



# ***The Indian Canon of Statutory Construction***

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- ✦ **A long-standing canon that ambiguities in statutes and treaties should be interpreted liberally in favor of Indians, or resolved from the standpoint of the Indians and to their benefit.**
- ✦ **Some courts have said that canons are guides, not conclusive, and some tribes have recently said that courts have eroded this doctrine.**

# ***Three Key Tribal Nations Rights and Powers***

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✧ **Sovereignty**

✧ **Immunity from Suit**

✧ **Trust Responsibility Duty of the United States**